

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**JOHN McCLELLAND & ASSOCIATES,  
INC.,**

**Plaintiff,**

**v.**

**MEDICAL ACTION INDUSTRIES, INC.,**

**Defendant.**

**CIVIL ACTION**

**No. 04-2545-CM**

**MEMORANDUM AND ORDER**

Plaintiff John McClelland & Associates, Inc., a former independent sales representative for defendant Medical Action Industries, Inc., brings this action for breach of oral contract, unjust enrichment, and quantum meruit seeking commission payments for sales completed from May 1, 2004 to the time of trial.<sup>1</sup> This matter is before the court on defendant's motion for summary judgment and plaintiff's motion for partial summary judgment. (Docs. 43 and 45).

**I. FACTUAL BACKGROUND<sup>2</sup>**

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<sup>1</sup> Defendant asserts that plaintiff is seeking commission payments for plaintiff's lifetime and beyond. But, as set out in the Pretrial Order, plaintiff's claims are limited to commission payments for sales occurring after plaintiff's termination, April 30, 2004, up to the time of trial, which is currently set for July 31, 2006. *See* Fed. R. Civ. P. 16(e); D. Kan. Rule 16.2(c)

<sup>2</sup> The court construes the facts in the light most favorable to the non-moving party pursuant to Fed. R. Civ. P. 56. The court has combined the facts proposed by both parties, and included only those that are relevant, material, and properly supported by the record. In accordance with Fed. R. Civ. P. 56, "all material facts set forth in the statement of the movant [are] deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party."

Plaintiff is an independent sales representative firm that represents medical-product manufacturers and distributors throughout Kansas and portions of Nebraska and Missouri. Defendant develops, manufactures, markets, and distributes a variety of medical products to hospitals and private medical practices. In 1986, plaintiff and defendant entered into an oral agreement in which plaintiff agreed to sell defendant's products and defendant agreed to pay plaintiff a commission on the products plaintiff sold. The parties agreed that either party could terminate the agreement at any time, for any reason. The parties did not set forth specific commission terms; instead, they negotiated the commission terms throughout their relationship. For example, during the 2001 fiscal year, the commission terms were governed by a Manufacturer's Rep Compensation Plan.

The parties acted pursuant to the agreement for over eighteen years. Then, in April 2004, defendant terminated the agreement and placed direct salespersons in plaintiff's former territory. Defendant paid plaintiff for commissions due through April 30, 2004, but did not pay plaintiff for sales made after plaintiff's termination. Plaintiff seeks post-termination commission payments for sales completed between May 1, 2004 and the time of trial that were (1) made to plaintiff's former customers and (2) for products in the same family as the products plaintiff sold for defendant. Plaintiff contends that it is entitled to these post-termination commissions because the sales were procured by plaintiff's efforts over the last eighteen years.

## **II. STANDARDS FOR JUDGMENT**

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most

favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10<sup>th</sup> Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

### **III. DISCUSSION**

#### **A. Defendant's Motion for Summary Judgment**

##### ***1. Breach of Oral Contract***

Defendant contends that it is entitled to summary judgment on plaintiff's breach of oral contract claim because plaintiff cannot show the existence of a contract and because the contract is barred by the statute of frauds.

##### **a. Existence of a Contract**

To prevail on its breach of contract claim, plaintiff must show each of the following: (1) the existence of a valid contract; (2) performance or tendered performance by plaintiff; (3) breach of the contract by defendant; and (4) damages to plaintiff resulting from the breach. *The Bradbury Co. v. Teissier-duCros*, 387 F. Supp. 2d 1167, 1171 (D. Kan. May 17, 2006). Defendant argues that the contract is invalid because there was no meeting of the minds on whether plaintiff was entitled to post-termination commissions.

To form a binding contract, the parties must have a "meeting of the minds" on the essential contract terms. *Sidwell Oil & Gas Co., Inc. v. Loyd*, 630 P.2d 1107, 1110 (Kan. 1981) (citation omitted). A meeting of the minds is "a fair understanding between the parties which normally accompanies mutual consent and the evidence must show with reasonable definiteness that the minds of the parties met upon the same matter and agreed upon the terms of the contract." *Steele v. Harrison*, 552 P.2d 957, 962 (Kan. 1976). The parties do not have to agree upon every term to form a binding contract. *Storts v. Martin K.*

*Eby Constr. Co.*, 535 P.2d 908, 913 (Kan. 1975).

Two persons may fully agree upon the terms of a contract, knowing that there are other matters on which they have not agreed and on which they expect further negotiation. Such an expectation does not prevent the agreement already made from being an enforceable contract.

*Id.* (quotation omitted). Disputes over the terms of the parties' agreement are questions of fact that must be resolved by the jury. *Med James, Inc. v. Ins. Mktg. Solutions, Inc.*, No. 05-2209-KHV, 2006 WL 1360400, at \*4 (D. Kan. May 17, 2006) ("Because the parties never signed a contract, the jury must resolve any disputes regarding the terms of the parties' oral agreement.").

The parties do not dispute that they reached an agreement with the following terms: (1) plaintiff would serve as an independent sales representative for defendant; (2) defendant would pay plaintiff a commission on all products sold in its territory; (3) and either party could terminate the agreement at any time. Although the parties did not address the specific terms regarding the commission payments at the time they formed their agreement, they negotiated the commission terms as needed over the course of their eighteen-year relationship. The commission terms changed throughout the eighteen years, but the original agreement remained constant; plaintiff sold defendant's products and defendant paid plaintiff a commission on the products sold. It is the contract's commission terms, not its existence, that is in dispute.

Defendant alleges the commission terms are supplied by the parties' later agreements – the 1998 Termination Policy and annual Manufacturer Rep Compensation. Plaintiff disputes the validity of the 1998 Termination Policy and the existence of the 2004 Manufacturer Rep Compensation Plan. The court finds that a contract exists, but that there are genuine issues of material fact as to the commission terms of the parties' oral agreement. These facts must be determined by the jury. Defendant's motion is denied.

**b. Statute of Frauds**

Defendant also argues that plaintiff's contract claim is barred by the Kansas statute of frauds, K.S.A. § 33-106. The statute of frauds prohibits claims for contracts that "cannot possibly be completed within a year." *Edwards & Assocs., Inc. v. Black & Veatch, L.L.P.*, 84 F. Supp. 2d 1182, 1201 (D. Kan. 2000) (citation omitted); *Nutt v. Knutson*, 795 P.2d 30, 31 (Kan. 1989). The parties' contract could have been completed within a year because it was terminable at the will of either party. *See Nutt*, 795 P.2d at 31. Under Kansas law, "[i]t is well settled that a contract of hiring which fixes no definite time for its termination is not within the statute [of frauds]." *Id.* (quoting *Talbott v. Gaty*, 231 P.2d 202 (Kan. 1951)). Therefore, the court finds that the contract is not barred by the statute of frauds.

## **2. Unjust Enrichment and Quantum Meruit**

Unjust enrichment is the modern designation for the equitable, quasi-contract doctrine of quantum meruit. *Pioneer Operations Co., Inc. v. Brandeberry*, 789 P.2d 1182, 1189 (Kan. App. 1990) (citing *Peterson v. Midland Nat'l Bank*, 747 P.2d 159, 166 (Kan. 1987)). "The substance of an action for unjust enrichment lies in a promise implied in law that one will restore to the person entitled thereto that which in equity and good conscience belongs to him." *Id.* (quoting *Peterson*, 747 P.2d at 166). To prevail on its unjust enrichment and quantum meruit claims, plaintiff must show that: (1) it conferred a benefit upon defendant; (2) defendant appreciated or knew of the benefit; and (3) defendant accepted or retained the benefit under such circumstances as to make it inequitable for defendant to retain the benefit without payment of its value. *See T.R. Inc. of Ashland v. Brandon*, 87 P.3d 331, 336 (Kan. Ct. App. 2004) (citation omitted). Whether plaintiff can prevail on its claims is a question of law for the court. *See id.*

The court takes defendant's motion for summary judgment on plaintiff's unjust enrichment and quantum meruit claims under advisement and reserves ruling until after it has heard all of the evidence.

**B. Plaintiff's Motion for Summary Judgment**

Plaintiff seeks summary judgment on its breach of oral contract claim for post-termination commissions under the parties' oral agreement and the procuring cause doctrine. The court finds that neither the oral agreement nor the procuring cause doctrine entitles plaintiff to summary judgment. First, as discussed above, there is a genuine dispute of material fact as to the terms of the oral agreement, including whether the agreement provides for post-termination commissions. Second, the procuring cause doctrine raises issues of fact that cannot be determined on summary judgment.

Under the procuring cause doctrine, "a commissioned sales person may be entitled to collect a commission if (a) the sales person produces a buyer ready, willing and able to purchase upon the terms offered; and (b) the sales person is the 'efficient and procuring cause' of a consummated deal." *Grammar, v. Stars to Go, Inc.*, No. 86-2490-S, 1989 WL 59000, at \*3 (D. Kan. May 1, 1989) (citing *Hiniger v. Judy*, 398 P.2d 305 (Kan. 1965)). "Whether a broker was the procuring cause of a purchase is ordinarily a question of fact and must be determined in the light of all the facts and circumstances leading up to and including any final negotiations between the vendor and purchaser." *Holloway v. Forshee*, 491 P.2d 556, 559-60 (Kan. 1971); *see also SW. Port Huron Co. v. Wilber*, 88 P. 892, 894 (Kan. 1907). The court finds that there is a genuine dispute of material fact as to whether plaintiff procured the continuing sales. These issues can only be resolved by the trier of fact evaluating the evidence at trial. Plaintiff's motion for summary judgment is therefore denied.

**IV. CONCLUSION**

The court has considered all of the arguments presented by the parties, although they are not all discussed here. Some of the arguments are irrelevant to the claims at issue in this case. Others have been

rendered moot by the court's decision here. After considering all of the evidence of record and the positions of the parties, the court reserves ruling on defendant's motion for summary judgment on plaintiff's unjust enrichment and quantum meruit claims, denies defendant's motion regarding plaintiff's breach of oral contract claim, and denies plaintiff's motion for partial summary judgment.

**IT IS THEREFORE ORDERED** that defendant's Motion for Summary Judgment (Doc. 43) is taken under advisement and denied in part.

**IT IS FURTHER ORDERED** that plaintiff's Motion for Partial Summary Judgment (Doc. 45) is denied.

Dated this 11<sup>th</sup> day of July 2006, at Kansas City, Kansas.

s/ Carlos Murguia  
**CARLOS MURGUIA**  
**United States District Judge**